Tiffany (NJ) Inc. et al v. eBay Inc. Doc. 68

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIFFANY (NJ) INC. and TIFFANY AND COMPANY,

Plaintiffs,

v.

eBAY INC.,

Defendant.

Case No. 04 Civ. 4607 (RJS)

MEMORANDUM OF DEFENDANT EBAY IN SUPPORT OF THE ADMISSIBILITY OF DEFENDANT'S EXHIBITS 250 AND 251

R. Bruce Rich
Bruce S. Meyer
Randi W. Singer
Mark J. Fiore
Lori M. Schiffer
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153

Attorneys for eBay Inc.

NY1:\1526538\03\WPV%03!.DOC\42805.0003

Dockets.Justia.com

Defendant eBay Inc. ("eBay") respectfully submits this memorandum of law in support of the admissibility of Defendant's Exhibits 250 and 251 as admissions of a party-opponent in accordance with Rule 801(d)(2)(D) of the Federal Rules of Evidence. Because these exhibits were prepared by an agent of Tiffany and Company ("Tiffany") concerning its investigation into grey market activity in Korea, these reports qualify as nonhearsay and thus should be admitted into evidence.

Rule 801(d)(2)(D) permits the admission of evidence as nonhearsay if the statement is offered against a party by the party's agent or servant concerning a matter within the scope of the agency or employment and is made during the existence of the relationship. See Fed. R. Evid. 801(d)(2)(D). In fact, "[t]he trend is toward the broad admissibility of [an] agent's statements"; "[w]hen an agent is employed to investigate and analyze an [incident], such report is an admission of the principal." Rollins v. Bd. of Governors For Higher Educ., 761 F. Supp. 939, 942 (D.R.I. 1991) (citing Collins v. Wayne Corp., 621 F.2d 777, 782 (5th Cir. 1980) (holding that hiring investigator to examine circumstances surrounding bus accident created an agency relationship, with agent's report an admission on behalf of principal)); see also Superior Steel Studs, Inc. v. Zurich N. Am., Inc., 368 F. Supp. 2d 208, 214 n.8 (E.D.N.Y. 2005) (finding report prepared by plaintiff's investigator admissible against plaintiffs under Rule 801(d)(2)(D)); Farr Man Coffee Inc. v. Chester, 88 Civ. 1692 (DNE), 1993 U.S. Dist. LEXIS 8992, at *48 n.30 (S.D.N.Y. June 28, 1993) (Edelstein, J.) (finding that report of investigator hired by underwriters to investigate claim of loss under insurance policy constituted admission of party-opponent under Rule 801(d)(2)(D)). Courts have even deemed an investigator's status as an agent of a party "obvious" for purposes of Rule 801(d)(2)(D), thereby permitting the introduction as evidence any statements or reports on behalf of the employer. See, e.g., Great N. Ins. Co. v. Dayco Corp., 620 F. Supp. 346, 350 (S.D.N.Y. 1985) (Duffy, J.) (holding that statements made by hired investigator constituted admission where statements were made within scope of agency and during relationship with employer).

Defendant's Exhibits 250 and 251 comprise admissions against a party-opponent because these investigative reports were generated by Kroll Associates acting specifically at the behest of Tiffany. Tiffany's problems with the "Potari Changsa," a group of Korean women who participate in organized shopping rings, prompted the retention of Kroll Associates and ensuing investigation into grey market activity by Kroll Associates. See Declaration of David Darren Chen, dated November 5, 2007, ¶ 16; see also DX 250 at TCO 069834 ("Kroll was retained by Tiffany to assist them in better understanding the scope, methods of operation, and channels of distribution of suspected grey market activity in Korea."). Indeed, at the request of Tiffany, Kroll Associates performed surveillance and "conduct[ed] discreet inquiries" into the trafficking of grey market goods from Korea to Japan. See DX 251 at TCO 069840-41. This is precisely the sort of "obvious" agency relationship that Rule 801(d)(2)(D) contemplates. Due to Tiffany's retention of Kroll Associates for the express purpose of conducting an investigation, any statements or judgments contained in its investigative reports concerning the diversion of genuine Tiffany jewelry constitute admissions against Tiffany.

CONCLUSION

Defendant's Exhibits 250 and 251 fall within the contours of Rule 801(d)(2)(D). Accordingly, Defendant's Exhibits 250 and 251 should be admitted into evidence.

Dated: New York, New York
November 13, 2007

WEIL, GOTSHAL & MANGES LLP

R. Bruce Rich (RR-0313)
Bruce S. Meyer (BM-3506)
Randi W. Singer (RS-6342)
Mark J. Fiore (MF-5738)
Lori M. Schiffer (LS-2234)
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Attorneys for Defendant eBay Inc.